Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

REPLY COMMENTS OF CHARLES COUNTY, MARYLAND

Charles County, Maryland. ("Charles County") hereby submits and files the following Reply Comments with the Federal Communications Commission ("FCC" or "Commission") in response to the *Second Further Notice of Proposed Rulemaking* ("FNPRM") in the above-referenced docket.

I. INTRODUCTION AND SUMMARY

The Commission's proposed rules to administratively expand the Congressionally-crafted statutory framework of "franchise fee" payments, made by cable operators to local governments in consideration for the private use of the public rights-of-way, are an impermissible exercise of authority and should not be issued. The Commission's *Second Further Notice of Proposed Rulemaking* is creating confusion and potential chaos to a regulatory regime that has, for decades, existed soundly at law and in practice. Billions of dollars' worth of private cable franchise agreements, which the Commission now proposes to impair, are built upon the stable statutory foundation of the Cable Communications Policy Act of 1984, as amended. ("Cable Act"). The Cable Act does not authorize the Commission to impair private franchise agreements.

For nearly 20 years, Charles County has worked diligently to ensure that the benefits of Public, Educational and Governmental Access communications reach all County subscribers. Emphatically, in Charles County, PEG channels and capacity have substantial value to subscribers, the public, and programmers, including the College of Southern Maryland (CSM), which provides both its own Higher Educational Access Channel as well as facilitating the Charles County Local Public Access Channel (LPACC); and Charles County Public Schools (CCPS) which operates a K-12 Educational Access Channel.

Comments filed in response to the Commission's *Second Further Notice of Proposed Rulemaking* by cable operators and industry trade associations paint a false picture of the relationship between cable operators and local governments. It is a picture that forms the foundation of all of the industry comments and yet reflects a complete mischaracterization of the franchise process. The comments attempt to portray local franchising authorities ("LFAs") as all-powerful government agencies that unilaterally dictate the terms and conditions of cable franchise

agreements. Cable operators, on the other hand, are portrayed as the victims of these overreaching LFAs that are forced to accept franchise requirements against their will. This is a false narrative that betrays a fundamental misunderstanding of the cable franchise process.

For example, the Internet and Television Association ("NCTA") states in its comments that, "a number of jurisdictions have come to rely on the franchising process…as a means of leverage to exact financial commitments and obtain products and services paid for by cable operators and their subscribers."[1] It further states that "cable operators lack bargaining power to refuse these (LFA) demands…" and that "[f]ranchising authorities continue to overreach, imposing detrimental franchise and fee requirements."[2] The NCTA consistently refers to "unreasonable franchise authority actions" as if these actions are unilateral.[3] Similarly, Verizon, in its comments, refers to, "excessive or burdensome demands" by LFA's and that, "unreasonable LFA demands deprive consumers of the benefits of competition."[4]

First, the notion that cable operators, such as Comcast and Verizon, lack bargaining power against local governments is, with all due respect, laughable. Most cable operators have exponentially greater financial and personnel resources than the vast majority of local governments. They also have legal departments that dwarf those of local governments. Second, the idea that local governments unilaterally dictate franchise terms to cable operators is not only false, but also is contrary to federal law. The Cable Act contemplates a negotiation between cable operators and LFA's to achieve franchise agreements.[5] Such franchise negotiations have taken place over at least the last 34 years and have resulted in a strong, stable, regulatory regime. At any given time, hundreds, if not thousands, of franchise negotiations occur throughout the United States. They are genuine, often hard-fought, and result in franchise agreements that are acceptable to both sides.

In other words, there are no terms or conditions in past or current cable franchise agreements that have not been accepted, approved, signed, and executed by the respective cable operators. Contrary to the comments by the NCTA, LFA's cannot legally or practically use the "franchising process as a means of leverage to exact financial commitments" on behalf of the cable operator, unless the cable operator has agreed in writing to such commitments. And if a cable operator agrees to certain financial commitments, it is typically in return for certain concessions made by the local government. Respectfully, based on their comments, industry lobbyists in Washington, D.C. demonstrate a regrettable lack of practical understanding of the cable franchise process.

The cable operators' professed victimization at the hands of local governments is also at odds with the statutory framework of the Cable Act. Cable operators enjoy numerous statutory rights and advantages under the Cable Act that are not granted to other private industries. Cable operators enjoy a presumption under the law that LFA's must perform timely and reasonable reviews of cable franchise initiation and renewal applications. Conversely, LFAs can only reject

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[1] Comments of the NCTA - The Internet and Television Association, MB Docket No. 05-311, at 3 (Nov. 14, 2018).
[2] *Id.* at 3, 6.
[3] *Id.* at 4.
[4] Comments of Verizon Communications, Inc. MB Docket No. 05-311, at 4 (Nov. 14, 2018).
[5] 47 U.S.C. § 546.

cable franchise proposals under the narrowest, statutorily-proscribed circumstances. Any cable operator adversely affected by any final decision of an LFA enjoys an enviable, statutorily-created right to standing and jurisdiction in, "(1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties."[6]

The Commission's proposed rules re-imagining what constitutes a "franchise fee" are impermissible because Congress has directly addressed the questions at issue by employing precise, unambiguous statutory language in the Cable Act. Insofar as Section 622 of the Act is plain and admits of no more than one meaning, the duty of interpretation does not arise. Only Congress may alter or amend federal law.[7] Charles County respectfully urges the Commission to decline to issue rules treating cable-related, non-monetary contributions required by a franchising agreement as "franchise fees" subject to the statutory five percent cap. Charles County also respectfully urges the Commission to decline to issue any rules impermissibly limiting the LFA's inherent and statutory authority to police non-cable services in the public rights-of-way.

II. THE COMMISSION SHOULD DECLINE TO PROMULGATE RULES IMPAIRING PRIVATE FRANCHISE AGREEMENT CONTRACTS

Billions of dollars' worth of private cable franchise agreements exist in concert with the Cable Act. The Commission tentatively concludes in its *Second Further Notice of Proposed Rulemaking* that, "we [the Federal Communications Commission] should treat cable-related 'in-kind' contributions required by a franchising agreement as 'franchise fees' subject to the statutory five percent cap on franchise fees set forth in Section 622 of the Communications Act of 1934, as amended ('the Act'), with limited exceptions."[8] However, the Commission has no basis, at law or statute, to impair or alter the obligations of private contracts by unilaterally "treating" as "franchise fees" non-franchise fee payments. In fact, the Act explicitly restricts the Commission's jurisdiction to regulate the amount of franchise fees paid by franchisees, or the local government's use of such funds.

A. The Cable Act Expressly Restricts Any Federal Agency from Regulating the Amount of Franchise Fees Paid, Except in Accordance with Section 622

Section 622(i) of the Act limits the Commission's role, plainly stating that, "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, **except as provided in this section**."[9] (emphasis added). Congress has spoken to the precise questions at issue by employing precise, unambiguous statutory language as to whether the Commission may regulate the amount of franchise fees paid by a cable operator. As a Federal agency, the Commission may not regulate the amount or use of franchise fees except as provided in Section 622.

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[6] 47 U.S.C. § 555.

[7] USCS Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[8] 83 FR 51911, 51913.

[9] 47 U.S.C. § 542(i).

The Commission's proposed rules in the *Second Further Notice of Proposed Rulemaking* would force portions of the franchise fees paid by cable operators to be valued according to a Commission-invented "fair market valuation" methodology. Regulation of the amount of franchise fees through a "fair market valuation" methodology is not provided in Section 622. But for a Commission-imposed "fair market valuation" on "cable-related, in-kind contributions," the amount of franchise fees payable is decided exclusively between a franchisee and the LFA. The Commission's proposed rules are impermissible as a statutorily-prohibited regulation of the "amount" of the franchise fees paid by a cable operator.[10]

Cable franchise agreements are private contracts negotiated at arms-length within the boundaries of the law. The Act promotes the rights of two sophisticated parties to obligate themselves to any legally-accepted terms upon which they voluntarily agree. The Cable Act does not prohibit franchisees from voluntarily negotiating additional payment or transfer of value, such as free or discounted cable services to public schools and libraries, in exchange for concessions they desire from LFAs.

Cable operators and their assets are never threatened or held captive by local franchising authorities. Enviable to many other industries, cable operators enjoy special legal rights, including a statutorily-created presumption that local franchising authorities must permit them to use the public rights-of-way for private use. Cable operators also enjoy a special right to renewal of their franchise agreements. The "excessive fees" about which NCTA complains must either be financially immaterial or legally permissible, or else such cable operator(s) would have filed suit. Uniquely, the Cable Act also grants any cable operator "adversely affected by any final decision of a local franchising authority" a special right to standing and jurisdiction in Federal or state courts of law.[11]

Here too, the NCTA displays an excessive rhetorical argument towards victimization. In its comments, the NCTA writes, "[i]t is simply not possible for cable operators to bring lawsuits every time an in-kind contribution is imposed and not applied toward the franchise fee…" This statement is absurd. Cable operators recognize they have legal rights, but refuse to exercise them.

Insofar as cable operators already employ legions of experienced and talented legal staff, the marginal cost of using existing legal staff to defend cable operator rights is minimal. And obviously, attorneys' fees are orders of magnitude cheaper for cable operators than abandoning infrastructure or forgoing sizeable profits from cable system operations. In addition, experienced litigators recognize that special legal rights granting jurisdiction, standing, and causes of action to cable operators alone are rare and invaluable.

The NCTA further comments, "[j]ust a few examples of the cost of fighting back against unreasonable demands for in-kind contributions include those incurred by a cable operator in the following cases: 1) one that cost almost $2.5 million; 2) one that cost more than $700,000; 3) one that cost more than $500,000; and 4) one that cost almost $500,000 and is still continuing. ."[12]

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[10] *Id.*

[11] 47 U.S.C. § 555.

[12] Comments of the NCTA - The Internet and Television Association, MB Docket No. 05-311, at 57-58 (Nov. 14, 2018).

Sadly, the NCTA failed to cite these cases so that others may review the docket. And no documentation was given to support the stated amount of attorneys' fees expended. Insofar as any of the aforecited examples refer to any franchise in the State of Maryland, Charles County demands that NCTA provide support or retract that portion of its comments.

B. The Commission Lacks Rulemaking Authority to Impair Private Franchise Contracts

The Commission's proposed rules in the *Second Further Notice of Proposed Rulemaking* would also impair private cable franchise agreement contracts by forcing the "treatment" of non-franchise fee payments as "franchise fees," subject to the five percent statutory cap. The Cable Act does not grant the Commission such broad and unchecked authority. The NCTA imagines that it does, commenting, "the Commission should reiterate that neither a cable operator nor a franchising authority may waive these provisions. Federal court and Commission precedent make clear that the federal policies detailed in the Cable Act preempt any asserted corresponding state or local authority and they may not be contracted around or waived. In fact, the Commission has so stated explicitly, noting that 'neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements.'" (internal citations omitted.)

Contrary to the desire of NCTA, nothing in the Cable Act preempts or eviscerates the rights of LFA's and franchisees to privately contract. For example, in the "Cable Franchise Agreement" between the County Commissioners of Charles County, Maryland and Comcast Cablevision of Maryland, Inc., effective June 5, 2002, the two parties agreed that, "any costs to the Franchisee [Comcast] associated with the provision of support for PEG access pursuant to this Agreement do not constitute and are not part of a franchise fee, and fall within one or more of the exceptions to 47 U.S.C. § 542."[13]

Cable operators are not prohibited by the statute from excluding certain costs from franchise fees, or from negotiating the provision of additional payment or transfer of value, such as free or discounted cable services to public schools and libraries, in exchange for concessions they desire from local franchising authorities. The FNPRM does not identify even a single instance or legal claim alleging that a local franchising authority impermissibly "required" a cable operator to provide or remit "in-kind" contributions or any type of value constituting "franchise fees" in excess of the five percent cap.

Based on the NCTA's comments, which inexplicably welcome invasive and expensive regulations, Comcast and the Charles County could not privately negotiate the entire amount of franchise fees. Instead, the parties would be required to engage in a costly and lengthy "fair market valuation" analysis to establish the dollar value of any "in-kind cable-related contributions." Nothing in the Cable Act prohibits Comcast and the Charles County from reaching such a private contractual agreement (consistent with the Act). Moreover, nothing in the Act authorizes the Commission to impair private franchise agreements in the manner desired by the NCTA in its comments. Charles County respectfully urges the Commission not to issue its proposed rules

[13] "Cable Franchise Agreement between the County Commissioners of Charles County, Maryland and Comcast Cablevision of Maryland, Inc.", effective June 5, 2002.

claiming to "treat" cable-related "in-kind" contributions required by a franchising agreement as "franchise fees" subject to the statutory five percent cap.

III. THE COMMISSION ARBITRARILY DEFINES "IN-KIND" CONTRIBUTIONS AND THWARTS CONGRESSIONAL INTENT

In the *Second Further Notice of Proposed Rulemaking* the Commission states, "we tentatively conclude that we should treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as 'franchise fees' subject to the statutory five percent franchise fee cap set forth in Section 622 of the Act...We tentatively conclude that this interpretation is most consistent with the statutory language and legislative history and seek comment on our analysis."[14]

Charles County responds to the *Second Further Notice of Proposed Rulemaking* by commenting in reply that: (1) the FCC's proposed rules treating "in-kind contributions" as "franchise fees" are impermissible because Congress has directly addressed the questions at issue by employing precise, complete, and unambiguous statutory language; (2) the FCC's invention of "in-kind contributions" and forced treatment of such as "franchise fees" is an impermissible construction of the Act; and (3) the FCC has acted arbitrarily and capriciously in inventing "in-kind contributions" and treating them as "franchise fees" subject to the statutory five percent franchise fee cap without adequate reasoning.

A. Commission Proposed Rules Would Impair the Existing Operation of the Cable Act and Thwart the Intent of Congress

In *Montgomery County, Md. et al. v. FCC* the United States Court of Appeals for the Sixth Circuit adjudicated claims against the FCC's Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 22 FCC Rcd. 19633 (Nov. 6, 2007) (hereinafter "Second Order") and the FCC's Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 30 FCC Rcd. 810 (January 21, 2015) (hereinafter "Reconsideration Order"). The Court in *Montgomery County* ruled, "the FCC has offered no explanation as to why the statutory text allows it to treat 'in-kind' cable-related exactions as franchise fees...And, apart from a fleeting reference in the Reconsideration Order, the FCC has not even defined what 'in-kind' means."[15]

Montgomery County further undercut the FCC's argument by observing, "that the term "franchise fee" can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."[16] (emphasis in original.) Moreover, the FCC's FNPRM and prior Orders attempt to distinguish between payments that do not involve the provision of cable services and payments unrelated to the provision of cable services. This is an improper construction of the statute. As the Court in *Montgomery County* ruled, the FCC "assumes that these (undefined) terms have some objectively discernable meaning as used in the Order—which they do not."[17]

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[14] 83 FR 51911, 51914-51915.
[15] *Montgomery County, Md et al. v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017).
[16] *Id.* at 491.
[17] *Id.* at 490.

The Commission's proposed rules in the *Second Further Notice of Proposed Rulemaking* would impair the existing operation of the Act and have the effect of thwarting the intent of Congress. In comments to the *Second Further Notice of Proposed Rulemaking*, the American Cable Association ("ACA") writes, "it is indisputable that 'cable-related' exactions may qualify as franchise fees…Because "franchise fees" may be—indeed typically are—cable-related, "cable-related, in-kind contributions" may be exempt from treatment as franchise fees only if the statute provides some basis for distinguishing in-kind contributions from other kinds of exactions. The statute does not…The fact that paragraph 622(g)(2) carves out specific exceptions to the definition of 'franchise fee' in paragraph 622(g)(1) **only strengthens that case that no general exemption exists for 'cable-related, in-kind contributions.'**" (emphasis added.)[18] The ACA is advocating a dangerously broad reinterpretation of franchise fees.

Under the interpretation of the *Second Further Notice of Proposed Rulemaking* offered by the ACA, no general exemption exists for "cable-related, in-kind contributions." This is an aggressive and unsustainable position for the 700 cable operator members of the ACA to pursue. In the view of the ACA, every contribution of value made by a cable operator is a franchise fee unless the value of that contribution is specifically carved out as an exception in 622(g)(2). The ACA specifically argues that the following contributions of value should automatically qualify as franchise fees: PEG-related costs; institutional network ("I-Net") costs; and cable-system 'build-out' costs.[19] Charles County objects to ACA's interpretation of the Cable Act and FNPRM.

The ACA's reasoning is apparent in its explanation on categorizing I-Net requirement costs as franchise fees. As it commented, "ACA further agrees with the Commission's tentative conclusion that 'cable-related, in-kind contributions' are 'franchise fees' under paragraph 622(g)(1) even if expressly contemplated elsewhere in Title VI. For instance, the fact that subsection 611(b) authorizes LFAs to require franchisees to designate channel capacity on institutional networks ("I-Nets") for governmental use does not exempt the costs incurred to provide that capacity from treatment as franchise fees."[20] The ACA's position would destroy cable operators' obligations to bear the costs for any 'cable-related, in-kind contribution' expressly contemplated in Title VI, but not specifically carved out as an exception in 622(g)(2).

Cable operators cannot classify as "in-kind" an obligation which they are legally bound to fulfill. Yet, the ACA is advocating exactly that position. The text of Section 611(b) plainly states that, "a franchising authority may…require as part of a franchise…that channel capacity be designated for public, educational, or governmental use, and **channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.**"[21] (emphasis added.) According to the ACA LFA's are only entitled to use as much of an I-Net as five percent of the franchisees' franchise fees will pay for.

As the ACA expressly commented, PEG-related costs, I-Net costs, and cable-system 'build-out' costs should all be considered franchise fees. Using the ACA's interpretive framework

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[18] Comments of the American Cable Association (ACA). MB Docket No. 05-311, at 4-5 (Nov. 14, 2018).
[19] *Id.* at 4-7.
[20] *Id.* at 6.
[21] 47 U.S.C. § 531(b).

of the FNPRM, there are other critical "cable-related, in-kind contributions" expressly contemplated in Title VI, but not specifically carved out as an exception to franchise fees in 622(g)(2); for example, the following: customer service obligations;[22] privacy protections;[23] safety and security protections; equal employment opportunity obligations;[24] and franchise fee audits. The ACA and its 700 cable operator members are openly seeking to destroy all Title VI obligations not carved out in 622(g)(2) by virtue of the Commission's proposed rules in *Second Further Notice of Proposed Rulemaking*.

B. Section 622 of the Act is Unambiguous that PEG Capital Costs, including Capacity, Equipment, and Facilities, are Not "Franchise Fees" Subject to 5% Cap

In its *Second Further Notice of Proposed Rulemaking*, the Commission writes, "for purposes of franchises granted after 1984, we tentatively conclude that PEG capital costs required by the franchise are in-kind cable related contributions excluded from the five percent cap. We seek comment on the above analysis."[25] Charles County agrees with the conclusion of the FCC that, for purposes of franchises granted after 1984, PEG capital costs required by the franchise are not "franchise fees" and are therefore excluded from the five percent cap. Section 622 of the Act is abundantly clear.

Charles County disagrees with the Commission's conclusion that PEG capital costs required by the franchise are "in-kind cable-related contributions." Support for this interpretation does not exist in the statute. The plain, unambiguous language of the statute is clear, rendering impermissible the FCC's invention of "in-kind cable-related contributions" as a categorization for PEG capital costs. In the statute, PEG capital costs are PEG capital costs; they are not "in-kind cable-related contributions." Effect must be given to Congress's words without regard to any divergent interpretation offered by the Commission.

In its comment, the NCTA also advocates a radical eradication of PEG capital costs, writing, "the Commission should confirm that PEG capital costs include only construction of PEG facilities (not cameras, playback devices and other equipment), including construction costs incurred in or associated with a PEG return line from the PEG studio to the operator's facility, and that any additional asks (including transport costs) are not part of the statutory exemption and must count towards the franchise fee cap."[26] The NCTA further comments, "franchising authorities and PEG groups frequently demand equipment and production support for remote origination of programming, free transport, live event coverage, and other activities that go well beyond "construction of PEG access facilities."...These exactions should be properly treated as in-kind contributions rather than PEG capital costs."[27]

As discussed above, any such demands related to PEG facilities and equipment are never manifested unless the cable operator agrees to them in the form of a franchise agreement. The

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[22] 47 U.S.C. § 552.
[23] 47 U.S.C. § 551.
[24] 47 U.S.C. § 554.
[25] 83 FR 51911, 51915. *(Internal citations omitted)*.
[26] Comments of the NCTA - The Internet and Television Association, MB Docket No. 05-311, at 47-78 (Nov. 14, 2018).
[27] *Id.* at 48.

NCTA's extreme position also diverges from existing practice, the plain language of the statute, and judicial interpretation. The plain language of Section 622(g)(2) states that the term "franchise fee" does not include, "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities," nor does it include, "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[28]

Moreover, in the legislative history of the statute, Congress made clear that it intended Section 622(g)(2)(C) to reach, "capital costs associated with the construction of [PEG] access facilities."[29] In clarifying the precise scope of the term "PEG access facilities," Congress further explained that it refers to "channel capacity (including any channel or portion of any channel) designated for public, educational, or governmental use, as well as facilities and equipment for the use of such channel capacity."[30] In further detail, Congress specified that **"[t]his may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity."** (emphasis added.)[31]

As to the judicial history, courts have categorically affirmed that equipment, facilities, and PEG channel capacity qualify as PEG capital costs within the Cable Act. According to the Court in *Alliance for Community Media v. FCC*, 529 F.3d 763, "the unambiguous expression of Congress confirms that 'PEG access capacity' extends not only to facilities but to related equipment as well…[Even] the [Federal Communications Commission] concedes that its definition of 'capital costs' covers the expense of equipment as long as it is 'incurred in or associated with the construction of PEG access facilities.'"[32] The comments of the NCTA must therefore be rejected.

The Commission's attempt to re-classify PEG capital costs as "in-kind cable-related contributions" is an impermissible construction of the statute that thwarts Congressional intent. Absent adequate diligence interpreting the statute and providing the reasoning for its decisions, the Commission's interpretation of the Cable Act is also arbitrary and capricious. Accordingly, Charles County respectfully urges the Commission to decline to issue its proposed conclusion that, "PEG capital costs required by the franchise are in-kind cable-related contributions."[33]

IV. THE COMMISSION ARBITRARILY DEFINES "FAIR MARKET VALUATION" AND THWARTS CONGRESSIONAL INTENT

In its *Second Further Notice of Proposed Rulemaking*, the Commission writes, "[w]e further propose that cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value. We seek comment on this proposal, and how such a market valuation should be performed. Alternatively, we seek comment on whether cable-related, in-kind contributions should be valued at the cost to the cable operator."[34] A Commission-proposed rule

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[28] 47 U.S.C. § 542(g)(2).
[29] H.R. Rep. No. 98-934, at 26.
[30] H. R. Rep. No. 98-934, at 45.
[31] *Id.*
[32] *Alliance for Community Media v. FCC*, 529 F.3d 763, 785.
[33] FR 51911, 51915. *(Internal citations omitted).*
[34] 83 FR 51911, 51916.

to invent a fair market valuation methodology for the purposes of calculating the franchise fee cap is not authorized by any statute or rulemaking authority.

The terms "fair market value" and "market valuation" do not exist in the Cable Act. The Commission would need to invent these concepts and procedures, as they apply to cable franchising. In the realm of tax law, the United States Supreme Court in *United States v. Cartwright*, 411 U. S. 546 (1973) ruled that, "[t]he fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[35]

The "fair market value" of an asset is intentionally distinct from similar terms such as market value, appraised value, or cost value because "fair market value" incorporates the economic principles of free and open market transactions. The U.S. Internal Revenue Service advises, "[i]n making and supporting the [fair market] valuation of property, all factors affecting [fair market] value are relevant and must be considered. These include: The cost or selling price of the item; Sales of comparable properties; Replacement cost; and Opinions of experts."[36]

The Commission's *Second Further Notice of Proposed Rulemaking* proposes to create a new regulatory burden upon private enterprise and government entities. If issued, the Commission's proposed rules would force portions of the franchise fees paid by cable operators to be valued according to a Commission-invented methodology ("fair market valuation"). The "fair market value" of PEG channels and PEG capacity, however, is zero dollars. The Cable Act unambiguously prohibits a PEG channel, or its capacity, from being used as anything other than a PEG channel. Only LFAs or their designees may control and operate PEG channels and capacity. So, the only qualifying "willing buyers" are LFAs. We are not aware of any evidence of any PEG channel or PEG capacity ever being sold by an LFA in the history of cable franchising.

In its comment, the position of the NCTA is that the Commission should, "adopt its prudent and reasonable proposal to value in-kind assessments for purposes of the franchise fee cap at their fair market value. In addition, the Commission should offer guidance on how to calculate a fair market price for the most common types of in-kind exactions, to ensure proper valuation and the use of consistent methodology across franchising authorities…[for] PEG Operating Costs…[the] Components of Valuations [are]…Value of the channel space: Market value of the comparable service…Transport. Market value of equivalent services and equipment." Uncharacteristically, the NCTA welcomes regulation, oversight, and added costs in valuation.

Under all methodologies, the costs of PEG channels and PEG capacity remain indivisible from the statutory requirement that cable operators must designate and provide "channel capacity for public, educational, or governmental use."[37] First, only local franchising authorities have a legal right to operate PEG channels. Second, every local franchising authority has the legal right to require that cable operators provide it with PEG channels. Third, PEG channels and capacity

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[35] *United States v. Cartwright*, 411 U. S. 546, 93 S. Ct. 1713, 1716-17 (1973) (quoting from U.S. Treasury regulations relating to Federal estate taxes, at 26 C.F.R. § 20.2031-1(b)).

[36] Internal Revenue Service Publication 561, "Determining the Value of Donated Property (Revised: 4/2007)" https://www.irs.gov/publications/p561#idm140501125178160 (December 2018).

[37] 47 U.S.C. § 531(b).

may only be programmed by public access community producers ("P" channel), local educational institutions ("E" channel), or local governments ("G" channel). Fourth, cable operators cannot exercise editorial control over PEG channels with very limited exceptions. In short, the plain language of the statute prevents PEG channels and PEG capacity from having any commercial market or value.

Additionally, putting a fair market value on PEG channel capacity is inconsistent with the fundamental purpose of PEG access and the legislative history of the Cable Act. The intrinsic value of PEG channels is high to the public, because it is a source of relevant local programming and promotes the transparency of local government; however, PEG capacity is designed for only public, educational and governmental purposes, and so has no commercial value. Accordingly, Charles County urges the Commission to decline to issue rules valuing "cable-related, in-kind contributions" at their fair market value.

V. THE COMMISSION LACKS AUTHORITY TO RESTRICT LOCAL FRANCHISING AUTHORITIES' RIGHTS TO POLICE NON-CABLE SERVICES ON PUBLIC RIGHTS-OF-WAY, INCLUDING MIXED-USE NETWORKS

The Commission's proposed *Second Further Notice of Proposed Rulemaking* declares, "[w]e thus tentatively conclude that the mixed-use network ruling prohibits LFA's from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers (with the exception of I-Nets, as noted above). ."[38] The Commission's proposed expansive rule would eviscerate municipal and state control of public rights-of-way and undermine decades of local, state, common law, and Federal statutory protections.

The authority and police powers vested in state and municipal governments encompass significantly more than those in the Cable Act. Moreover, the authority of municipal and state governments arise from a number of sources, including but not limited to, municipal law, state law, common law, and Federal statutes and regulations.

While we disagree with Verizon's position in this FNPRM, even Verizon recognizes the sovereign authority of municipal and state governments, commenting, "[t]he Commission should confirm that non-cable services, such broadband, Voice over Internet Protocol, etc., offered to customers over a mixed-use network are not subject to LFA regulation under a cable services franchise...**As the Commission has previously noted, this declaration does not affect the ability of local authorities to regulate non-cable services under other applicable regulatory regimes**. *See Second Report and Order* ¶ 11 n.31."[39] (emphasis added.)

In practice, municipal and state governments use cable franchise agreements to reserve all regulatory authority arising from the Cable Act and any other applicable federal or state laws or regulations. Cable franchising agreements do not remove, restrict or reduce municipal and state

[38] 83 FR 51911, 51917

[39] Comments of Verizon Communications, Inc. MB Docket No. 05-311, at 4 (Nov. 14, 2018).

governments' authority, rights and privileges it now holds, or which hereafter may be conferred upon it, including any right to exercise its police powers in the regulation and control of the use of the public rights-of-way. Also, cable franchising agreements are always subservient to the police powers of municipal and state governments to adopt and enforce general laws and regulations necessary for the safety and welfare of the public.

The Commission lacks authority to restrict local franchising authorities' rights to police non-cable services on public rights-of-way, including mixed-use networks. The Commission also lacks authority to impair private franchise agreement contracts. The Commission's proposed mixed-use rule constitutes an invention of false limitations on municipalities' regulatory and police powers in its public rights-of-way.

VI. CONCLUSION

For the reasons stated forth herein, Charles County strongly urges the Commission to decline to issue an order implementing the rules proposed in its *Second Further Notice of Proposed Rulemaking*. Charles County respectfully thanks the Federal Communications Commission and its Commissioners for the opportunity to submit reply comments.

Respectfully submitted,

/s/ Joel S. Winston, Esq.

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Dated: December 14, 2018.

APPENDIX

Statements of community leaders in Charles County, Maryland:

(i) Katie O-Malley-Simpson, Director, Communications, Charles County Public Schools;

(ii) Maureen Murphy, Ph D., President, College of Southern Maryland;

Charles County Public Schools

5980 Radio Station Road
P.O. Box 2770
La Plata, MD 20646
Main line: 301-932-6610
www.ccboe.com

Kimberly A. Hill, Ed.D.
Superintendent of Schools

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

Comments of Charles County Public Schools

Charles County Public Schools is filing comments on the Second Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket. Charles County Public Schools (CCPS) is a kindergarten through Grade 12 public education system serving 27,108 students and employing more than 3,500 people, most of whom are teachers. The school system is located 25 miles south of Washington, D.C., and is a blend of suburban and rural living. We operate 36 schools and four educational centers.

The CCPS Communications/Media Relations office operates two educational channels — Comcast Channel 96 and Verizon FiOS Channel 12. We provide educational programs as well as staff-produced videos. We also air our elected Board of Education meetings live on both channels. The channels allow us to operate in a more transparent manner, making access to Board meetings accessible to those unable to attend.

CCPS strongly opposes the tentative conclusion in the FNPRM that the value of cable franchise obligations, such as those that allow our programming to be viewed on the cable system, can be deducted from franchise fees. We have relied heavily on the funding we receive from the Charles County Commissioners through franchise fees. That funding helped us set up our television station and in the past five years has provided nearly a $500,000 to upgrade our aging equipment. All of the equipment upgrades would be cost prohibitive if we had to fund them through our operating budget. Our television stations provide unique programming and access to instructional programs otherwise unavailable in many areas in our county. It would also limit access to our Board meeting broadcasts to a portion of our population that has no internet access.

We dispute the implication in the FNPRM that public, educational, and government access television (PEG) programming is for the benefit of the local franchising authority (LFA) or the PEG provider, rather than the public. As demonstrated above, CCPS provides valuable local programming on the cable system that is not otherwise available to many of our residents. Yet, the Commission tentatively concludes that non-capital PEG requirements should be considered franchise fees because they are, in essence, taxes imposed for the benefit of LFAs or their designated PEG providers. By contrast, the FNPRM tentatively concludes that build-out requirements are not franchise fees because they are not contributions to the franchising authority. The FNPRM then requests comment on "other requirements besides build-out obligations that are not specifically for the use or benefit of the LFA or an entity designated [by] the LFA and therefore should not be considered contributions to an LFA."[1] PEG programming fits squarely into the category of benefits that do not accrue to the LFA or its designated access provider, yet the Commission concludes without any discussion of the public benefits of local programming that non-capital PEG-related provisions benefit the LFA or its designee rather than the public and cable subscribers.

[1] FNPRM ¶ 21.

We invite the Commission to view for themselves the important benefits provided by PEG programming. You can view some of our local programing through the links below. The programming includes On Air, a program that provides students with hands-on experience in broadcasting, and special programing like *It's Academic* and graduations, which allow people to watch the events live or on rebroadcast from the comfort of their homes.

(www.ccboe.com/ccboetv/?videoscategory=on-air; www.ccboe.com/ccboetv/?videoscategory=special-programs)

Again, please accept our filing expressing our strong opposition to the proposed rules in the FNPRM.

Respectfully submitted,

Katie O'Malley-Simpson

Katie O'Malley-Simpson
Director, Communications
5980 Radio Station Road
La Plata, MD 20646
December 13, 2018

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF COLLEGE OF SOUTHERN MARYLAND

The College of Southern Maryland (CSM) appreciates the opportunity to file comments on the Second Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket. The College of Southern Maryland (CSM) is a regionally accredited community college that provides programs and services for the residents of Calvert, Charles, and St. Mary's of Maryland. CSM serves more than 23,000 credit and continuing education students at its campuses located in Hughesville, La Plata, Leonardtown and Prince Frederick, as well as a Higher Education Center shared with University of Maryland University College in Waldorf and a Center for Transportation Training in La Plata.

CSM operates two cable channels: CSM-TV and Charles County's Local Public Access Channel. CSM-TV is the cable access station serving CSM, its faculty, staff, and students, and community viewers, providing high-quality educational and informational programming which showcases CSM and in support of its events and projects. As a part of the local educational

access cable system, CSM-TV produces original staff-produced programming and acquires a vast array of public interest programming. Additionally, the channel provides an outlet for programming produced by students enrolled in CSM's Digital Media Production Associate of Arts program of study, which provides our students an ever-expanding curriculum to meet the needs of industry, while creating an environment conducive to helping students grow intellectually and creatively to meet the demands of tomorrow's marketplace. In this program, students learn to formulate, construct, and deliver digital audio, video, broadcast graphics, and animation. CSM-TV is simulcast on Comcast Channel 98 and Verizon Channel 16 in Charles County. In St. Mary's County, the college shares content with other higher education institutions on Metrocast Channel 98, and in Calvert County, the college shares content with Calvert County Government to be aired on Comcast Channel 6, which is jointly used by government, public schools, public access and higher education.

Charles County's Local Public Access Channel (LPACC-TV) is made available through funding from the Charles County Government to residents of Charles County on a non-discriminatory basis. The studio is physically located at the College of Southern Maryland, La Plata Campus, Francis P. Chiaramonte, MD Center for Science and Technology, Room ST-139. Equipment and facility reservations are made on a first-come, first-served basis to certified users with a Statement of Compliance on file. A user must be an individual, organization or institution that has a legal address in Charles County. The Public access programming airs on Verizon Channel 11 and Comcast Channel 99 in Charles County. LPACC-TV provides quality and engaging community television to county residents 24-hours per day and encourages the participation of the public. Original programming includes: Comcast NewsMakers, monthly Indian Head Town Meetings, monthly La Plata Town Meetings, The Servants of Christ ministry,

The Shiloh Hour ministry, MDOT MTA Commuter Connections, Anti-Vaping Campaign PSA's, Maryland Vehicle Theft Prevention PSA's, and community bulletin board messages for non-profit organizations serving Charles County. Other programs aired on LPACC-TV include opioid awareness, the arts, public service announcements, and community awareness videos. Programming particularly of the towns of Indian Head and La Plata town councils enables these governmental entities to operate in more transparent manners by extending the access to these meetings to those otherwise unable to attend in person.

The College of Southern Maryland strongly opposes the tentative conclusion in the FNPRM that the value of cable franchise obligations, such as those that allow our programming to be viewed on the cable system, can be deducted from franchise fees. The Charles County Board of County Commissioners provided the funding to build and equip Charles County's Local Public Access Studio in 2011 and has subsequently provided approximately a total of $820,000 in funding to the studio for maintenance and upgrades of cameras and studio equipment, and for the staffing.

Using fair market value to determine the amount to be considered a franchise fee will lead to arbitrary deductions. The annual funding provided through the franchise fees by the Charles County Board of County Commissioners to CSM is the sole source for operating Charles County's Local Public Access Channel and would be cost-prohibitive for the College to maintain this through the college's operating funds. This includes maintaining the staff to program the content received from the Charles County residents, staffing the facility during public access hours, providing training to Charles County users on the equipment, supporting the public in their use of equipment and the facility, and providing a unique hands-on interactive

learning environment for the college's Digital Media Production students through valuable internship experience.

We reject the implication in the FNPRM that PEG programming is for the benefit of the local franchising authority (LFA) or the PEG provider, rather than the public. As demonstrated above, the College of Southern Maryland provides valuable local programming both through CSM-TV and LPACC-TV that is not otherwise available on the cable system. Yet the Commission tentatively concludes that non-capital PEG requirements should be considered franchise fees because they are, in essence, taxes imposed for the benefit of LFAs or their designated PEG providers. By contrast, the FNPRM tentatively concludes that build-out requirements are not franchise fees because they are not contributions to the franchising authority. The FNPRM then requests comment on "other requirements besides build-out obligations that are not specifically for the use or benefit of the LFA or an entity designated [by] the LFA and therefore should not be considered contributions to an LFA."[1] PEG programming fits squarely into the category of benefits that do not accrue to the LFA or its designated access provider, yet the Commission concludes without any discussion of the public benefits of local programming that non-capital PEG-related provisions benefit the LFA or its designee rather than the public and cable subscribers.

Respectfully submitted,

Maureen Murphy, Ph D.
President, College of Southern Maryland
December 13, 2018

[1] FNPRM ¶ 21.